Supreme Court, U.S.
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ALEXANDER L. STEVAS
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NO. 84-1963

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

R. O. GIVENS SIGNS, INC.,
Petitioner

v.

TOWN OF NAGS HEAD; DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELIZABETH H. DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION; RONALD E. HEINZ, DIVISION ADMINISTRATOR OF THE FEDERAL HIGHWAY ADMINISTRATION; T. L. WATERS, MANAGER OF PLANNING AND RESEARCH BRANCH OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; and WILLIAM R. ROBERSON, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION;
Respondents

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Roy A. Archbell, Jr.
Shearin & Archbell
Post Office Box 269
Kitty Hawk, NC 27949
Telephone: (919) 261-2191
Counsel for Petitioner

QUESTIONS PRESENTED

I. Does petitioner, an owner of outdoor advertising signs which have been removed without the payment of just compensation contrary to an express provision of the Highway Beautification Act, have standing to privately enforce the provisions of the Highway Beautification Act mandating that the Secretary of the United States Department of Transportation impose on any state which does not provide effective control in accordance with the Act a penalty of ten percent of the federal aid highway funds allocated to that state?

II. Does said petitioner have standing to privately enforce the provisions of the Highway Beautification Act mandating that just compensation shall be paid upon the removal of any outdoor advertising sign subject to the said Act?

Title of this case in this Court is:

R. O. GIVENS SIGNS, INC., Petitioner

v.

TOWN OF NAGS HEAD ET AL, Respondents

TABLE OF CONTENTS

Questions Presented i

Table of Authorities. iii

Opinions Below. 1

Jurisdiction. 2

Statute Involved. 2

Statement of Case 3

Reasons for Granting Writ 5

Conclusion. 20

Appendix. 21

Opinion of the Fourth Circuit Court of Appeals. 22

Order of District Court. 29

Judgment of District Court 36

Opinon of North Carolina Court of Appeals 38

Memorandum of United States Department of Transportation Dated May 20, 1979. 49

Certificate of Service. 53

TABLE OF AUTHORITIES

Association of Data Processing Servic Organizations, Inc. v. Comp, 397 US 150, 90 S Ct 829, 25 L Ed 2d 184 (1970) 10

California et al v. Sierra Club, 451 US 287, 101 S Ct 1775, 682 L Ed 2d 101 (1981) 14

Cort v. Ash, 422 US 66 (1975) 14

Flast v. Cois, 392 US 883, 88 S Ct 1942, 20 L Ed 2d 947 (1968). 10

Givens v. Town of Nags Head, 58 NC App 697, 297 SE 2d 388, cert denied, 307 NC 127, 97 SE 2d 400 (1982). . . 7

Maine v. Thiboutot, 448 US 1, 100 S Ct 2502, 65 L Ed 2d 555 (1980). . . . . 11& 16-18

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 US 1, 101 S Ct 2615, 69 L Ed 2d 435 (1981) 15

National Advertising v. City of Ashland, 628F 2d 106 (9th Cir. 1982). 11

Pennhurst State School and Hospital v. Halderman, _____ US _____, ,101 S Ct 1531, 67 L Ed 2d 697 (1981). 13

United States v. Students Challenging Regulatory Agency Procedures, 412 US 669, 92 S Ct 2405, 37 L Ed 2d 254 (1973) 10

23 USC §131, Highway Beautification Act . i,2-5,8& 10-20

28 USC §1254. 2

28 USC §1331. 5

28 USC §1343. 5

28 USC §1361. . . . . 5, 11& 18

42 USC §1983. . . . . 5& 11-15

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

R. O. Givens Signs, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals entered in the above entitled case on March 20, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is printed in the Appendix attached hereto, infra, page 22. The order of the United States District Court for the Eastern District of North Carolina is printed in the Appendix attached hereto, infra, page 29. The judgment of the United States District Court for the Eastern District of North Carolina is printed in the Appendix attached hereto, infra, page 36.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 20, 1985 (Appendix. infra, page 22). The jurisdiction of the Supreme Court is invoked under 28 USC §1254.

STATUTE INVOLVED

The statute involved is 23 USC §131 which provides in pertinent part in subparagraph (b) thereof:

> Federal-aid highway funds apportioned on or after January 1, 1968, to any state which the Secretary determines has not made provision for effective control of the erection and maintenance ... of outdoor advertising signs .. shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State ....

and in subparagraph (g) thereof:

> (g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

STATEMENT OF CASE

Petitioner, a North Carolina corporation engaged primarily in the business of outdoor advertising throughout northeastern North Carolina, commenced the above entitled civil action on June 6, 1983, in the United States District Court for the Eastern District of North Carolina, Elizabeth City Division. The action sought, among other things, to enforce the provisions of the Highway Beautification Act, 23 USC §131, mandating the payment of just compensation for the removal of certain outdoor advertising signs owned by petitioner and, in the alternative, for an order directing the Secretary of the United States Department of Transportation to invoke the 10% penalty provision of the Highway

Beautification Act against the State of North Carolina for its failure to comply with the provisions of the Act requiring the payment of just compensation to petitioner. On cross motions for summary judgment the federal district court dismissed these claims and all others exerted by petitioner on the grounds that the petitioner had already litigated all claims alleged in the complaint in an earlier state court action. In that earlier state court action the North Carolina Court of Appeals held that petitioner was not entitled to be paid money for its signs pursuant to applicable state statutory provisions. (Appendix, infra, page 38). The Court of Appeals for the Fourth Circuit, while acknowledging that North Carolina's Outdoor Advertising Act was not in effective compliance with the federal act at the time petitioner tried its state court lawsuit, affirmed the trial court holding. The Fourth Circuit stated in footnote 2 on page 3 of its opinion:

> As a result of the General Assembly's delay in codifying the federal act's just compensation requirement, North Carolina'a federal highway funds are subject to being reduced by 10% for each year in which it failed to comply with the federal requirement. 23 USC §131(b).

Petitioner alleged (and made a factual showing in support thereof on cross motions for summary judgment) claims, inter alia, arising under 42 USC §1983 and 23 USC §131. The District Court had jurisdiction of those claims pursuant to 28 USC §§1331, 1343 and 1361.

Pursuant to order of the federal district court petitioner's signs have been taken down. To date petitioner has not received any monetary compensation for its signs.

REASONS FOR GRANTING WRIT

The federal district court ordered the removal of petitioner's signs without the payment of monetary compensation in the face of 23 USC §131(g) which provides:

> (g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device

> lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:
>
> > (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
> >
> > (B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

Petitioner's signs have now been removed in obedience to the federal district court's order. No monetary compensation has been paid to petitioner. To date North Carolina's federal highway funds have not been reduced by 10 percent.

The North Carolina Court of Appeals, the forum in which petitioner has been adjudged by the courts below to have had its day in court on claims for monetary compensation and curtailment of North Carolina's federal highway funds, stated the following with

regard to the petitioner's claim for monetary compensation under state law:

> We note that the Federal Act was amended in 1978 specifically to avoid this result and to require compensation for signs legal when erected. The judgment of the trial court effectively imposed these federal requirements on the State Act. We question this result, however, since our legislature had not adopted the 1978 amendments when this matter was considered by the trial court. Plaintiff argues that the express terms of the State Act contravene the intent of the Federal Act, as amended, and jeopardize a portion of our Federal Highway Funds. While this contention may be well taken, amendment of the statute is within the purview of the legislature and not this Court. Since legislative action had not been taken to alter the clear wording of the State Act prior to the trial of this action, we cannot find advertising signs legal which have been rendered illegal pursuant to state law. Givens v. Town of Nags Head, 58 NC App 697, 297 SE 2d 388, cert denied, 307 NC 127, 297 SE 2d 400 (1982) (Appendix, infra, page 43)

Even though both the North Carolina Court of Appeals and the United States Court of Appeals for the Fourth Circuit appear to recognize that the failure to pay petitioner monetary compensation places North Carolina in non-compliance with requirements of "effective

control" as defined in 23 USC §131(c) and therefore subject to the 10% reduction in federal aid highway funds, no such reduction was ordered by either court. Nor was any such relief granted by the federal district court even though petitioner had specifically sought such relief in its complaint.

Notwithstanding that 23 USC §131(g) mandates that "just compensation be paid upon removal of any outdoor advertising sign ... lawfully erected under State law ... whether or not removed pursuant to or because of this section ...", petitioner was not allowed by the courts below to exert any rights to compensation under this provision. This result was reached by the lower courts seemingly without regard to the fact that petitioner's signs were "lawfully erected under State law" only to subsequently become "illegal" pursuant to the five year amortization provision contained in the Town of Nags Head's zoning ordinance. In other words, the signs in question were <u>compensable</u> under federal law because "lawfully erected

under State law" even though the signs were subsequently made "illegal" by a land use ordinance of the Town of Nags Head.

It is noteworthy that the official position of the United States Department of Transportation as stated in Memo dated May 20, 1979, to its Regional Federal Highway Administrators is that such signs as those in question are "compensable" even though such signs have become "illegal" under State law. (Appendix, infra, page 50). As stated in the United States Department of Transportation memo ... "if the reason that the sign is 'illegal' is tied to some non-volitional act of the owner, such as the expiration of an amortization period, then the sign is compensable ..." (Appendix, infra, page 50)

In that petitioner has not been compensated for its signs (the estimated value of which is $70,000.00) which have now been removed as directed by the federal district court, it has clearly suffered an economic injury. Such a direct economic injury would appear to give petitioner standing to exert

its rights under 28 USC §131. See United States v. Students Challenging Regulatory Agency Procedures, 412 US 669, 92 S Ct 2405, 37 L Ed 2d 254 (1973); Association of Data Processing Service Organizations, Inc. v. Comp, 397 US 150, 90 S Ct 829, 25 L Ed 2d 184 (1970). In Flast v. Cois, 392 US 883, 88 S Ct 1942, 20 L Ed 2d 947 (1968), the Supreme Court held that the concept of standing was related solely to the question of whether the case was justiciable, and whether the dispute sought to be adjudicated would be presented by a party with sufficient interest in the controversy to assure an adversary presentation. A party, such as petitioner, with a direct financial interest of thousands of dollars is obviously a party with sufficient interest to assure an adversary proceeding.

If petitioner has rights arising under the Highway Beautification Act and has an adequate legal interest or standing to exert those rights, the question then arises as to the specific nature of the remedial vehicle available to petitioner to enforce its rights.

Petitioner submits that it should be able to enforce its rights under the Highway Beautification Act against the federal defendants by obtaining relief in the nature of mandamus pursuant to 28 USC §1361. See National Advertising v. City of Ashland, 628 F 2d 106 (9th Cir. 1982). Further, petitioner urges that it should be able to exert its claims for money damages, declaratory and equitable relief against the state defendants pursuant to 42 USC §1983. Maine v. Thiboutot, 448 US 1, 100 S Ct 2502, 65 L Ed 2d 555 (1980).

Contrary to the holdings in the courts below, petitioner has not had its day in court on the question as to whether or not petitioner can privately enforce its rights arising under the Highway Beautification Act against either the federal or state defendants. The North Carolina Court of Appeals held that petitioner was not entitled to monetary compensation under state law because there was no state statutory right to compensation on the statute books at the time

petitioner went to trial in its state court action. The trial judge in the state court action denied petitioner's motion to amend its complaint to allege a claim under 42 USC §1983. The North Carolina Court of Appeals affirmed the state trial court's ruling and therefore petitioner never got a day in state court on the question of its right to compensation under the federal statutory law, i.e. the Highway Beautification Act. In that the federal defendants were not parties to the state court action and the state court had no jurisdiction in any event to litigate claims against them under the Highway Beautification Act, it should be obvious that petitioner did not have its day in state court against the federal defendants. Since the federal courts below dismissed petitioner's claims on the grounds that petitioner had already had its day in court in the state court lawsuit, petitioner has clearly not had an opportunity to exert its rights under the Highway Beautification Act in any forum.

Unless this petition is allowed and the questions posed herein addressed, petitioner will not get its day in court on its entitlement to compensation under federal law and right to privately enforce the penalty provision contained in the Highway Beautification Act.

In Pennhurst State School and Hospital v. Halderman, ____ US _____, 101 S Ct 1531, 67 L Ed 2d 694 (1981), the Supreme Court stated that the criteria to be applied to determine when a private citizen may assert that he has been denied the benefits under a federal statutory scheme by those acting under state law are - (1) whether Congress has foreclosed private enforcement of that statute in the enactment itself and (2) whether the statute at issue was the kind that created enforceable "rights" under Section 1983. There is nothing contained in the Highway Beautification Act that would indicate Congress intended to foreclose private enforcement unless one places that interpretation on the ten percent penalty provision. As to the second criteria,

i.e. whether the statute at issue created rights enforceable under §1983, there is simply no question that the compensation provision of the Highway Beautification Act was intended to benefit the class of sign owners of which the petitioner is a member. The "rights" concept is discussed in California et al v. Sierra Club, 451 US 287, 101 S Ct 1775, 682 L Ed 2d 101 (1981). The appropriate focus of the "rights" argument is whether the plaintiff is a member of the class for "whose special benefit the statute was enacted". See also Cort v. Ash, 422 US 66 (1975). The relevant inquiry is an attempt to distinguish between whether there is a special class of people that a particular legislative scheme was enacted to benefit or whether the scheme in question was for the benefit of the public at large. Certainly the overall scheme of the Highway Beautification Act was intended to benefit the public at large by obtaining the removal of large outdoor advertising signs along the primary road system. However, the compensation provision of the Highway

Beautification Act was clearly aimed at that class of sign owners of which the petitioner is a member. Thus it is clear that the second criteria is also satisfied in the instant case. See Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 US 1, 101 S Ct 2615, 69 L Ed 2d 435 (1981).

Petitioner submits that the focus of this Court's inquiry on this issue should be on whether the ten percent penalty provision in the Highway Beautification Act was intended by Congress to foreclose private enforcement of the compensation provision. If the petitioner is in fact among the class that the compensation provision in the Highway Beautification Act was intended to benefit, and if one further assumes that the ten percent penalty provision was intended to be the exclusive enforcement mechanism, then are not the federal courts required to do one of two things? Either the federal courts must find that the petitioner has a private right of enforcement of the compensation provision under Section 1983, based upon the reasoning

in Maine v. Thiboutot, supra, or recognize that the petitioner has standing to have the Secretary of the United States Department of Transportation invoke the ten percent penalty provision. Surely petitioner is not without a remedy when Congress has given it a right. In other words, is it not now the duty of the federal court system to recognize that the petitioner was specifically granted a right by Congress to compensation and that Congress granted some form of remedy for this right? Either that remedy is one of private enforcement of the compensation provisions of the Highway Beautification Act or the federal courts should invoke the ten percent penalty provision against the State of North Carolina. A right without a remedy is no right at all. The legislative history of the legislation in question clearly establishes petitioner's right to be paid for its signs. Thus, petitioner either has the right to have the federal courts invoke the remedy of private enforcement of the compensation provisions or

to insist that the penalty provision be invoked.

Continuing with this analysis brings us to Maine v. Thiboutot, supra. Justice Powell, writing in dissent in Thiboutot, recognized and stated the scope of the holding by the majority.

> In practical effect, today's decision means that State and local governments, officers, and employees now face liability whenever a person believes he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights. (The emphasis on the word "any" was that of Justice Powell.)

Id. at page 570.

Footnoting, and thus limiting, the previous statement, Justice Powell wrote:

> The only exception will be in cases where the governing statute provides an exclusive remedy for violation of its terms. (Emphasis added)

Id. at page 570.

In the appendix to his dissent Justice Powell listed the Highway Beautification Act as a federal-state cooperative program that might be one of those affected by the holding

in Thiboutot. Implicit in Justice Powell's dissent is that the ten percent penalty provision of the Highway Beautification Act was not an "exclusive remedy" for the violation of its terms as referred to in the above quoted footnote from his dissent.

Clearly the signs that have been removed are "compensable" under the "effective control" provisions of the Highway Beautification Act. Since the signs have come down and no compensation has been paid to petitioner, the State of North Carolina is now in violation of the "effective control" provisions of the Highway Beautification Act and hence the ten percent penalty provision must be invoked. This is not a discretionary matter. 23 USC §131(b) reads:

> Federal-Aid Highway funds apportioned on or after January 1, 1968, to any state which the secretary determines has not made provision for effective control ... shall be reduced by amounts equal to ten percentum .... (Emphasis added)

28 USC §1361 gives the District Court original jurisdiction in an action in the nature of mandamus to compel federal officials

to perform obligations in matters involving non-discretionary ministerial duties. Since the language of the Highway Beautification Act mandates the ten percent penalty provisions for those states which do not have effective control, the federal courts are confronted herein with a situation in which they have the power to direct the Secretary of the United States Department of Transportation to invoke the penalty provision of the Highway Beautification Act. If the federal courts fail to do so, then the federal courts will, as a practical matter, have frustrated the intention of Congress in enacting the 1978 amendments to the Highway Beautification Act. It should be obvious to this Court that neither the United States Department of Transportation nor the North Carolina Department of Transportation are sympathetic to the plight of the petitioner. The mandate of Congress is clear. The duty of the federal courts to grant the relief requested should be equally clear.

CONCLUSION

Petitioner seeks to have this Court determine whether or not it can privately enforce rights arising under the Highway Beautification Act. Petitioner's signs have been taken down pursuant to order of the federal district court. The Highway Beautification Act mandates that petitioner be paid just compensation for its signs or that the State of North Carolina lose 10% of its federal aid highway funds. Petitioner has not been paid and the 10% penalty provision has not been invoked. Petitioner asks this Court to allow this petition and rule as to whether petitioner is entitled to be paid money for its signs or to invoke the 10% penalty provision.

Respectfully submitted,

SHEARIN & ARCHBELL

By: _____

Roy A. Archbell, Jr.
Southern Shores Law Building
Post Office Box 269
Kitty Hawk, NC 27949
Telephone: (919) 261-2191
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1653

R. O. Givens Signs, Inc., Appellant

versus

Town of Nags Head; Department of Transportation of the State of North Carolina; United States Department of Transportation; Elizabeth H. Dole, Secretary of the United States Department of Transportation; Ronald E. Heinz, Division Administrator of the Federal Highway Administration; T. L. Waters, Manager of Planning and Research Branch of the North Carolina Department of Transportation; William R. Roberson, Jr., Secretary of the North Carolina Department of Transportation, Appellees

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Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. W. Earl Britt, District Judge. (C/A 83-24-Civ-2)

Argued: January 8, 1985
Decided: March 20, 1985

Before RUSSELL and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Roy A. Archbell, Jr. (Shearin & Archbell on brief) for Appellant; Thomas L. White, Jr. (Kellogg, White, Evans, Sharp & Michael on brief) and John V. Hunter, III (Hunter, Wharton & Howell on brief) and Robert Showers (Janet L. Steckel, James E. Scapellato; James B. Richmond on brief) for Appellees.

PER CURIAM:

Plaintiff/Appellant R. O. Givens Signs, Inc. challenges the validity of an ordinance enacted by defendant/appellee Town of Nags Head.[1] We find no error in the district court's holding that Givens' claims are barred by res judicata, and, accordingly, affirm.

I.

This case arose out of the effort of the Town of Nags Head, North Carolina, a small tourist town located on the eastern seaboard, to eliminate billboards and other off-premises highway advertising that detracted from the town's scenic beauty. In May 1972 the town enacted an ordinance that prohibited the construction of off-premises commercial signs

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[1] Jurisdiction was premised on 28 USC §1331 (1983).

and provided that all existing off-premises commercial signs were to be removed by December 31, 1977. The ordinance did not provide for the payment of compensation for the signs that were to be removed, but it did provide for a five and one-half year amortization period. Such a provision in lieu of compensation was found reasonable in cases of this character in State v. Joyner, 286 NC 366, ____, 211 SE 2d 320, 325, appeal denied, 422 US 1002 (1975).

The federal Highway Beautification Act provides that just compensation must be paid for the involuntary removal of any outdoor advertising sign. 23 USC §131(g). The North Carolina General Assembly, however, did not bring its Outdoor Advertising Control Act, N.C.G.S. §136-126, et seq (1981), into effective compliance with the federal act's just compensation requirement until June 11, 1982. 1982 N.C. Sess. Laws (Reg. Sess., 1982) ch. 1147, §1 (codified at N.C.G.S. §136-131.1

(Supp. 1983)).[2] In adopting a just compensation requirement the General Assembly deleted a provision that would have applied the compensation requirement to billboards subject to pending litigation.

Givens, which owns thirty off-premises commercial signs located within the town's boundaries, brought an action in the North Carolina state courts seeking a declaration that the ordinance was unconstitutional and thus void. The trial court found in Givens' favor, holding that the ordinance had been preempted by the 1982 amendments to the state act. On appeal, the North Carolina Court of Appeals reversed. R. O. Givens, Inc. v. Town of Nags Head, 58 NC App 697, 294 SE 2d 388, cert. denied, 3067 NC 127, 297 SE 2d 400 (1982). It held that Givens' signs became illegal after December 31, 1977, well before a

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[2] As a result of the General Assembly's delay in codifying the federal act's just compensation requirement, North Carolina's federal highway funds are subject to being reduced by 10% for each year in which it failed to comply with the federal requirement. 23 USC §131.(b).

just compensation requirement was adopted by the General Assembly. It further held that the federal act's just compensation requirement was not applicable absent parallel state adopting legislation, legislation that was not enacted until 1982 and which expressly deleted language that would have made its provisions applicable to this pending litigation. The court of appeals, moreover, held that the ordinance was a restriction well within the town's police power, did not infringe Givens' First Amendment rights, and did not violate equal protection. In addition, the court of appeals held that the ordinance was not confiscatory:

> The trial court's holding that the town ordinance is confiscatory is in conflict with the decision of our Supreme Court in State v. Joyner, 286 NC 366, 211 SE 2d 320, appeal dismissed, 422 US 1002, 95 S Ct 2618, 45 L Ed 2d 666 (1975). Joyner upheld the constitutionality of an ordinance requiring removal of nonconforming uses without compensation after a three-year amortization period. We have concluded that the five and one-half year amortization period here is reasonable in view of Joyner.

Id. at _____, 294 SE 2d at 391. Finally, the court held that the federal act did not create individual rights enforceable in a 42 USC §1983 action. Givens thereafter brought this action in federal court alleging claims identical to those previously alleged in the state court action. The district court, on res judicata grounds, granted summary judgment for the town as to the realleged claims and granted summary judgment on the town's motion for removal of Givens' nonconforming and illegal signs.

II.

Res judicata bars Givens' claims. Givens had an opportunity to argue and fully argued each claim asserted herein before the North Carolina Court of Appeals, which found constitutional and enforceable the town's ordinance. Givens cannot relitigate such claims in this court. Allen v. McCurry, 449 US 90, 95 (1980). See also 28 USC §1738.

Furthermore, the district court properly held that the town is entitled to an order enforcing its ordinance despite the town's

failure to seek coercive relief in the state declaratory action. The state action merely declared the relative rights of the parties. It does not, however, preclude another proceeding to enforce the rights previously declared.

The judgment of the district court is accordingly

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 83-24-CIV-2

R. O. GIVENS SIGNS, INC., Plaintiff
v.
TOWN OF NAGS HEAD, ET AL, Defendants

ORDER

Plaintiff, a corporation engaged in the business of outdoor advertising, owns some thirty-four outdoor advertising signs within the zoning jurisdiction of defendant Town of Nags Head. In May 1982 (sic) the Town of Nags Head passed an ordinance which prohibited off-premises commercial signs and required that any nonconforming signs be removed within a five-year period, later extended to 31 December 1977. Plaintiff brought this action in June 1983 attacking the ordinance on constitutional grounds, complaining of several actions taken by state and federal administrative agencies and seeking compensation for the signs pursuant to a

recently-enacted state statute. Specifically, plaintiff advances seven claims for relief: (1) a claim pursuant to 42 USC §1983 for deprivation of rights under the Federal Highway Beautification Act, 23 USC §131; (2) a pendent claim for compensation under the North Carolina Outdoor Advertising Control Act, N.C.G.S. §§136-126 et seq, (1981); (3) a claim pursuant to 42 USC §1983 for deprivation of first and fourteenth amendment rights; (4) a claim pursuant to 42 USC §1983 for unlawful taking of property without just compensation in violation of the fifth and fourteenth amendments; (5) a claim pursuant to 42 USC §1983 for denial of equal protection and due process; (6) a claim that the decision made by state and federal officials to reclassify U. S. 158 Bypass as a federal-aid secondary highway was an abuse of discretion; and (7) a claim pusuant to 42 USC §1985 that the state defendants conspired to defeat plaintiff's right to just compensation under federal law. Defendant Town of Nags Head has also counterclaimed, requesting that plaintiff be

required to remove its billboards which are now in violation of the ordinance. Jurisdiction is asserted pursuant to 28 USC §1331 (1982).

This matter is now before the Court on several motions. Ready for ruling are: (1) plaintiff's motion for summary judgment on its own second and sixth claims for relief; (2) motion for summary judgment by defendant Town of Nags Head as to plaintiff's claims and its own counterclaim; (3) the state defendants' motion for summary judgment; and (4) the federal defendants' motion to join in the motion for summary judgment by the Town of Nags Head.

Disposition of this case is controlled by the fact that plaintiff, in January of 1978, commenced an action in the North Carolina Superior Court for Dare County attacking the same town ordinance in dispute here. Many of the same causes of action advanced here were argued before the state trial court. Although plaintiff prevailed at the trial court level, the North Carolina Court of Appeals reversed,

holding that (1) the ordinance did not unconstitutionally restrict free speech; (2) it did not violate equal protection; (3) by allowing compensation through amortization, rather than cash, the state statute did not deprive plaintiff of his constitutional right to just compensation; (4) plaintiff was not entitled under state law to cash compensation for his signs; and (5) 42 USC §1983 created no individual cause of action under the Federal Highway Beautification Act, 23 USC §131. R. O. Givens, Inc. v. Town of Nags Head, 58 NC App 697, 294 SE 2d 388 (1982). The North Carolina Supreme Court declined discretionary review of the cases and no further review was sought. Consequently, the North Carolina Court of Appeals decision stands as the final judgment in the state court action.

Having received disposition unfavorable to it in state court, the plaintiff now seeks to relitigate this matter in federal court. By adding several new defendants and causes of action plaintiff unsuccessfully attempts to distinguish this case from the one previously

brought. Clearly plaintiff's first five claims have already been litigated against the Town and are barred on res judicata grounds. The sixth and seventh claims, brought against federal and state officials, are based on a decision by the Federal Department of Transportation to reclassify Highway 158 Bypass on which plaintiff's signs are located. The reclassification decision was made after plaintiff commenced the state court action but before the final disposition of in the North Carolina Court of Appeals. It was determined by the Court of Appeals that plaintiff was not entitled to compensation under the state statutes as they stood. Plaintiff cannot now bring a new suit on the grounds that the law changed after the previous suit had been litigated. Plaintiff was given a full and fair opportunity to present its claims in state court. Whether or not this Court agrees with the state court's decision is irrelevant. Plaintiff is not entitled to relitigate matters which have already been the subject of one lawsuit. The reclassification decision

plaintiff attacks in its sixth and seventh claims came after it was already determined that plaintiff had no right to cash compensation. The reclassification decision did not serve to deprive plaintiff of any benefits to which it was entitled.

The only claim remaining is the counterclaim by defendant Town of Nags Head for removal of plaintiff's signs. As the Court has jurisdiction pursuant to 28 USC §1331 to decide the federal claims presented by plaintiff, it may, in its discretion, choose to exercise pendent jurisdiction over related state law claims. Adkins v. Kelly's Creek R. R., 338 F. Supp 888 (D.W. Va. 1970). The Court has elected to assert jurisdiction over defendant Town of Nags Head's counterclaim in this manner. It appears to the Court that the Town was entitled to removal long ago. By filing this lawsuit plaintiff has used the Court to delay the inevitable. The town ordinance has been found to be valid. Accordingly, the motion by defendant Town of Nags Head for summary

judgment on its counterclaim for removal of plaintiff's nonconforming signs is granted.

In summary, plaintiff's motion for summary judgment is denied and the motions for summary judgment by the various defendants are allowed. It is hereby ORDERED that plaintiff remove all off-premises commercial outdoor advertising structures which violate the zoning ordinances of the Town of Nags Head or allow the Town to remove the structures pursuant to N.C.G.S. §160A-175(e) (1982) and §1-6 of the Nags Head Code.

This 5 June, 1984.

W. Earl Britt
United States District Judge

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

No. 83-24-CIV-2

R. O. GIVENS SIGNS, INC.

V.

TOWN OF NAGS HEAD, ET AL

JUDGE PRESIDING: W. EARL BRITT

DECISION BY COURT. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiff's motion for summary judgment is denied and the motions for summary judgment by the various defendants are allowed. It is hereby ORDERED that plaintiff remove all off-premises commercial outdoor advertising structures which violate the zoning ordinances of the Town of Nags Head or allow the Town to remove the structures

pursuant to N.C.G.S. §160A-75(e) (1982) and §1-6 of the Nags Head Code.

THE ABOVE-JUDGMENT WAS ENTERED THIS DAY, JUNE 6, 1984 AND COPIES MAILED TO:

Mr. Roy A. Archbell, Jr.
P. O. Box 269
Kitty Hawk, NC 27949

Mr. Thomas L. White, Jr.
P. O. Box 189
Manteo, NC 27954

Mr. John V. Hunter, III
P. O. Box 1191
Raleigh, NC 27602

Mr. James B. Richmond
Special Deputy Attorney General
P. O. Box 25201
Raleigh, NC 27611

U. S. Attorney
P. O. Box 26897
Raleigh, NC 27611

Mr. Joseph E. Scapellato
Asst. Regional Counsel
Atlanta, GA 30367

J. RICH LEONARD, CLERK
By: Gerald J. Atkins,
Deputy Clerk

NO. 811SC775

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 1982

R. O. GIVENS, INC.

v.

Dare County
No. 78CVS6

THE TOWN OF NAGS HEAD

Appeal by defendant from Preston, Judge. Judgment entered 16 March 1981 in Superior Court, Dare County. Heard in the Court of Appeals 30 March 1982.

This appeal is from the trial court's holding that an ordinance of the Town of Nags Head is unconstitutional and void. The ordinance in question prohibits off-premise commercial signs and requires their removal by 31 December 1977. Plaintiff, a corporation engaged in the business of outdoor advertising, brought this action for a declaratory judgment that the ordinance is null and void or, alternatively, a judgment requiring the town to compensate plaintiff for its loss in excess of $70,000 resulting from removal of its signs.

The town averred in its answer that the 1977 zoning ordinance was merely a recodification of a 1973 ordinance to which plaintiff had not objected. It was argued, therefore, that plaintiff's claim was barred by the statute of limitations and laches. The town also denied plaintiff's claim that the ordinance was unconstitutional.

According to stipulations, plaintiff owns 675 off-premise advertising signs in 13 counties, 30 of which are in Nags Head. The town of Nags Head is located on the Outer Banks of North Carolina, and tourism is a vital part of its economy.

The primary purpose of the ordinance is to eliminate structures which block and detract from the town's scenic beauty. A period of five and one-half years was allowed between the time off-premise signs were outlawed in 1972 and the time their removal was required. Although plaintiff added no new signs after 1972, it claimed entitlement to the fair market value of its pre-existing signs.

The trial court found that the Nags Head ordinance had been preempted by the Outdoor Advertising Control Act (state act) and that the State had shown legislative intent to conform the latter to the Federal Highway Beautification Act (federal act). The court further concluded that the State's failure to comply with the federal act could result in a penalty. Accordingly, the local ordinance was declared void to the extent that it was inconsistent with the requirements of the federal act regarding compensation for removal of signs along primary highways.

The court adjudged Nags Head zoning ordinance §6.04E(6) "arbitrary, unreasonable, confiscatory, unconstitutional and void" and permanently restrained its enforcement.

Defendant appealed. Plaintiff appealed from denial of its motion to amend its complaint.

Shearin, Gaw & Archbell, by Roy A. Archbell, Jr. and Norman W. Shearin, Jr., for plaintiff appellee.

Kellogg, White, Evans & Sharp, by Thomas L. White, Jr., and Hunter, Wharton & Howell, by John V. Hunter, III, for defendant appellant.

ARNOLD, Judge.

This action is complicated by the fact that outdoor advertising is subject to state and, indirectly, to federal regulation as well as to municipal control. Thus the trial court was required to consider the scope of the state Outdoor Advertising Act, G.S. 136-126, adopted by our legislature to implement the Federal Highway Beautification Act, 23 USC §131, in determining the applicability of the Nags Head Ordinance.

On 11 June 1982 the General Assembly enacted Chapter 1147 of the Session Laws by adding a new section to Article 11 of Chapter 136 of our General Statutes. The new section, which expires 30 June 1984, requires that when outdoor advertising is removed just compensation shall be required in accordance with paragraphs (2), (3) and (4) of G.S.

136-131. Language in the bill (House Bill 193) enacted as Chapter 1147 which would have made the act applicable to billboards subject to pending litigation was removed prior to enactment by the General Assembly.

Defendant brings forth eight arguments in its appeal and plaintiff cross-appeals with one assignment of error.

I.

The first contention of the town of Nags Head is that the trial court erred in finding that the local ordinance was preempted by the state act. The town argues that the state act does not affect signs located in areas zoned commercial or industrial and that nothing in the state act prohibits municipalities from regulating advertising which falls outside its provisions. This interpretation is supported by other state statutes which expressly provide that "[t]he fact that a State or federal law, standing alone, makes a given act, omission or condition unlawful shall not preclude city ordinances requiring a highway standard of conduct or condition." G.S.

160A-174(b). See also G.S. 160A-390. Thus, the town contends that it is authorized to outlaw outdoor advertising which is not regulated by state law and to provide compensation by amortization since the state act's compensation provision has no relevance. We tend to agree with the town.

With respect to advertising signs which are not located in areas zoned commercial or industrial, the determination of applicable law is more complicated. The state and federal acts specifically require cash compensation to sign owners whose signs are removed pursuant to those acts. However, in order to be compensable, the state statute requires that a sign be "lawfully erected under the state law." G.S. 136-131. The signs in question here, having been rendered unlawful by local zoning ordinances adopted pursuant to the state enabling statute, G.S. 160A-381, are not signs "lawfully erected" and therefore are not compensable.

We note that the federal act was amended in 1978 specifically to avoid this result and

to require compensation for signs legal when erected. The judgment of the trial court effectively imposed these federal amendments on the state act. We question this result, however, since our legislature had not adopted the 1978 amendments when this matter was considered by the trial court. Plaintiff argues that the express terms of the state act contravene the intent of the federal act, as amended, and jeopardize a portion of our federal highway funds. While this contention may be well-taken, amendment of the statute is within the purview of the legislature and not this Court. Since legislative action had not been taken to alter the clear wording of the state act prior to trial of this action, we cannot find advertising signs legal which have been rendered illegal pursuant to state law.

II.

The town next challenges the trial court's conclusion that its zoning ordinance as to off-premises outdoor advertising is overbroad, exceeds police power and is

arbitrary, oppressive, unreasonable and capricious.

We have examined the zoning scheme and stated objectives of the town and we find the off-premises advertising restriction to be within the police power of the municipal government. Indeed, in the landmark case of Metromedia, Inc. v. San Diego, 453 US 490 (1981), the U. S. Supreme Court upheld a similar ordinance insofar as it affected commercial advertising signs. "Esthetics" have, in fact, been held to constitute a legitimate consideration in the exercise of police power. See Metromedia, supra; State v. Jones, 53 NC App 466, 281 SE 2d 91 (1981), affirmed 305 NC 520 (1982).

As to the finding that the ordinance in question unconstitutionally restricts freedom of speech, we are not persuaded by plaintiff's circuitous analysis of Nags Head's zoning laws that the sign restriction in any way affects non-commercial speech. The definition of "outdoor advertising structure" adopted by the town would appear expressly to limit

application of the sign ordinance to commercial signs. As the town points out, the definition closely parallels that which received U. S. Supreme Court sanction in Suffolk Outdoor Advertising Co. v. Hulse, 439 US 808 (1978) Accordingly, we hold that the ordinance imposes constitutional time, place and manner restrictions only and does not infringe on First Amendment rights.

The trial court's holding that the town ordinance is confiscatory is in conflict with the decision of our Supreme Court in State v. Joyner, 286 NC 366, 211 SE 2d 320, appeal dismissed, 422 NC 1002 (1975). Joyner upheld the constitutionality of an ordinance requiring removal of non-conforming uses without compensation after a three-year amortization period. We have concluded that the five and one-half year amortization period here is reasonable in view of Joyner.

Finally, we reject the plaintiff's contention that the town's prohibition of off-premise commercial signs, while permitting on-premise signs, violates equal protection.

The U. S. Supreme Court has stated in similar fact: that "... off-site commercial billboards may be prohibited while on-site commercial billboards are permitted." Metromedia, 453 at 512. The court explained that the city's legitimate interest could reasonably have been found to outweigh one classification of private interest, but not another.

Having concluded from the foregoing that the trial court erred in its conclusion of law with regard to the enforceability of the Nags Head sign ordinance, we find it unnecessary to reach defendant's remaining assignments of error.

PLAINTIFF'S APPEAL

III.

Plaintiff brings forth one assignment of error in its cross-appeal, charging that the trial court erred in denying plaintiff's motion to amend its complaint to allege a claim under 42 USC §1983 of the Civil Rights Act. Plaintiff's argument is based on the U. S. Supreme Court's holding in Maine v. Thiboutot, 448 US 1 (1980), that §1983 actions

could be brought for violation of federal statutory rights. Our review of 23 USC §131, however, reveals no creation of individual rights thereunder since the federal act does not impose regulation, but only authorizes federal-state agreements pursuant to which state regulatory statutes may be adopted. We can find no basis for a §1983 cause of action and hold that plaintiff's motion to amend, therefore, was properly denied.

The order of the trial court is reversed and the cause remanded for disposition consistent with this opinion.

Reversed and remanded.

Judges CLARK and WEBB concur.

U.S. GOVERNMENT DEPARTMENT OF TRANSPORTATION

Memorandum Federal Highway Administration

Date: May 20, 1979

SUBJECT: Outdoor Advertising Program
Just Compensation

FROM: Chief, Real Property Acquisition
Division

TO: Regional Federal Highway Administrators
Region 1-10

Mr. Lorenzo Casanova's memorandum of March 5 issued to clarify the provisions of the Surface Transportation Assistance Act of 1978, states that signs must receive compensation upon removal if they were lawfully erected and in existence on the effective date of the Act (November 6, 1978) even if the compensable interest has terminated under State law prior to that date. In addition, it requires compensation for signs removed prior to November 6, 1978, but which were the subject of litigation on that date. Several specific questions were presented to the Office of the Chief Counsel regarding the impact of this opinion on our present program. Listed below is a summary of the questions asked, and the answers received.

Q.1. - What is the effect of this opinion on Federal regulations dealing with the maintenance of nonconforming rights (23 CFR, 750.707)? Presently nonconforming signs, erected lawfully, are to be maintained in accordance with State regulations, or be found illegal and removed with no compensation.

A.1. - Existing nonconforming sign maintenance regulations, found at 23 CFR 750.707, are unaffected. However, State

regulations may not be confiscatory in nature. Most State courts have developed rather explicit criteria for determining whether or not a given regulation is reasonable or not. Such criteria generally relate to the possibility of continuing a business operation in compliance with the regulations, the legitimacy of the regulations, the goal of the regulations involved, the relationship between the regulatory goal and the impact on the regulated business, and the nature of the business involved.

Q.2. - What is the effect of this opinion on signs declared illegal under various circumstances both prior to, and subsequent to November 6, 1978 by a State highway authority and/or a State court.

A.2. - The March 5, 1979, opinion applies to all signs standing in place on or after November 6, 1978, and those additional signs which were in litigation on November 6, 1978. If the sign is illegal because of a failure to comply with a reasonable police power regulation, or some volitional act of the owner, then the 1978 amendments do not require that such a sign be compensated. However, if the reason that the sign is "illegal" is tied to some nonvolitional act of the owner, such as the expiration of an amortization period, then the sign is compensable for purposes of the 1978 amendments.

Q.3. - What is the effect of this opinion on State permit and license law?

A.3. - Reasonable State permit requirements will continue under the 1978 amendments. A State may not terminate a lawful sign by simply refusing a permit unless the failure to reissue is tied to some reasonable police power regulation. If the failure to issue a new permit is tied to some act of the owner, such as an intentional failure by the owner to apply for renewal, a

sign may be terminated for failing to have a valid permit.

Q.4. - What is the effect of this opinion on the compensation due site owners?

A.4. - Rules for site owners are precisely the same as for sign owners in the above situation.

Q.5. - What is the effect of this opinion on compensability to sign and site owner when the sign owner has no private contractural (sic) right to maintain the sign on the site? Heretofore such signs, lawfully erected, were not eligible for compensation.

A.5. - Nothing in the 1978 amendments or in the March 5 opinion affects our present position on this issue.

Q.6. - What is the effect of this opinion on Federal regulations (23 CFR. 750-306(a)(2)) requiring evidence of nonconformity as of the date of taking?

A.6. - If a sign does not conform to a state or local land use control law and has not become illegal, it is "nonconforming" under the definition found at 23 CFR, 750-303(e). Therefore, 23 CFR, 750-306(a)(2), is not affected by the 1978 amendments.

Q.7. - What is the effect of this opinion on Federal regulations requiring a photograph of the sign in place as documentation for Federal participation (23 CFR, 750-306(a)(1))? Signs removed prior to November 6, but in litigation on that date may not satisfy this requirement.

A.7. - Documentation functionally equivalent to the required photograph should be obtainable because of the necessity to describe the signs at issue in the lawsuit.

Q.8. - What is the effect of this opinion on the rights of localities to amortize on-premise signs and signs within urban areas but beyond 660 feet of the Interstate and primary systems?

A.8. - All signs permitted under 23 USC 131(c), including on-premise signs and signs beyond 660 feet within urban areas are not affected by the amendments on compensation.

Q.9. - Are we to measure the value of "just compensation" without regard to the remaining economic life of the sign under establishment of amortization periods?

A.9. - The March 6, 1979, opinion coupled with clear legislative history of the 1978 amendments, indicate that the Congress intended to completely reject amortization for signs affected. Thus, the value of a sign may not be reduced by any amortization period, whether or not it expired before November 6, or was in progress on that date.

Q.10. - Since the laws and regulations of virtually all States are now in conflict with Federal law, how long a time period should States have to bring their laws into compliance?

A.10. - The length of time which a State would have to come into compliance with the 1978 amendments is not a legal question. The 1978 amendmens are effective as of November 6, 1978, and any State not in compliance on that date is technically in violation of the Highway Beautification Act. Any State which does not comply with these requirements will be in violation of the provisions of Section 131(b) subjecting the State to reduction of its Federal-aid highway apportionment.

Please advise if you have any additional questions regarding the "just compensation" provisions of the 1978 amendments.

G. B. Saunders

CERTIFICATE OF SERVICE

I, Roy A. Archbell, Jr., counsel of record for R. O. Givens Signs, Inc., petitioner herein, hereby certify that on June 17th, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals on each of the parties herein, as follows:

On the Town of Nags Head, respondent herein, by depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of Thomas L. White, Jr., Kellogg, White, Evans, Sharp and Michael, the above-named respondent's counsel of record, at Post Office Box 189, Manteo, North Carolina, 27954.

On the Town of Nags Head, respondent herein, by depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of John V. Hunter, III,

Hunter, Wharton and Howell, the above-named respondent's counsel of record, at Post Office Drawer 10037, Raleigh, North Carolina, 27605.

On the North Carolina Department of Transportation; T. L. Waters, Manager of Planning and Research Branch of the North Carolina Department of Transportation; and William B. Roberson, Jr., Secretary of the North Carolina Department of Transportation, respondents herein, by depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of James B. Richmond, Special Deputy Attorney General, State of North Carolina, Department of Justice, the above-named respondents' counsel of record, at Post Office Box 25201, Raleigh, North Carolina, 27611.

On the United States Department of Transportation; Elizabeth H. Dole, Secretary of the United States Department of Transportation; and Ronald E. Heinz, Division Administrator of the Federal Highway Administration; respondents herein, by

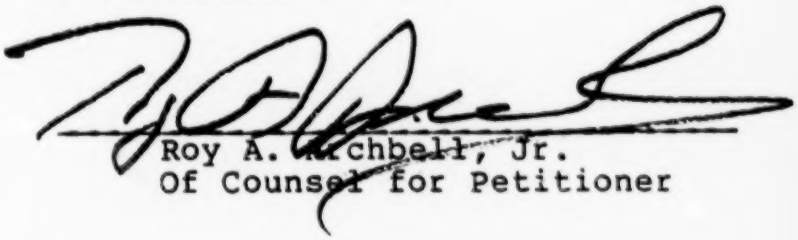
depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of James E. Scapellato, Assistant Regional Counsel, United States Department of Transportation, Federal Highway Administration, the above-named respondents' counsel of record, at Suite 200, 1720 Peachtree Road, NW, Atlanta, Georgia, 30367.

On the United States Department of Transportation; Elizabeth H. Dole, Secretary of the United States Department of Transportation; and Ronald E. Heinz, Division Administrator of the Federal Highway Administration; respondents herein, by depositing such copies in the United States Post Office, with first class postage prepaid, properly addressed to the post office address of Janet L. Steckel, Appellate Section, Land and Natural Resources Division, United States Department of Justice, the above-named respondents' counsel of record, at Room 2340, Washington, DC, 20530, and on the Solicitor

General, Department of Justice, Washington, DC, 20530.

ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED.

Dated June 17th, 1985.



Roy A. Archbell, Jr.
Of Counsel for Petitioner

(2)

Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-1963

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

* * * * * * * * * * * * * * * * * * *

R. O. GIVENS SIGNS, INC.,
Petitioner

v.

TOWN OF NAGS HEAD; DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELIZABETH H. DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION; RONALD E. HEINZ, DIVISION ADMINISTRATOR OF THE FEDERAL HIGHWAY ADMINISTRATION; T. L. WATERS, MANAGER OF PLANNING AND RESEARCH BRANCH OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; and WILLIAM R. ROBERSON, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION;
Respondents

* * * * * * * * * * * * * * * * * * *

BRIEF IN OPPOSITION

* * * * * * * * * * * * * * * * * * *

THOMAS L. WHITE, JR.
KELLOGG, WHITE, EVANS, SHARPE & MICHAEL
P. O. Box 189
Manteo, NC 27954
(919) 473-2171

JOHN V. HUNTER III
HUNTER, WHARTON & HOWELL
P. O. Box 10037
Raleigh, NC 27605
(919) 828-5466

Counsel for Respondents

Dated: July 15, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the District Court and the Court of Appeals correctly hold that Petitioner's claims, litigated to final judgment in the courts of North Carolina, were barred by the doctrine of res judicata?

TABLE OF CONTENTS

QUESTION PRESENTED. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

STATEMENT OF THE CASE 1

I. THE FACTS. 2

II. THE FOURTH CIRCUIT'S DECISION. . . 2

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING CERTIORARI. 3

The claims of Petitioner were finally determined against him in the courts of North Carolina and the federal trial court properly entered summary judgment against him for that reason. 3

CONCLUSION. 3

TABLE OF AUTHORITIES

Highway Beautification Act, 28 U.S.C. § 131. 2

Civil Rights Act, 42 U.S.C. § 1983 2

NO. 84-1963

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

* * * * * * * * * * * * * * * * * * * *

R. O. GIVENS SIGNS, INC.,
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v.

TOWN OF NAGS HEAD; DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA; UNITED STATES DEPARTMENT OF TRANSPORTATION; ELIZABETH H. DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION; RONALD E. HEINZ, DIVISION ADMINISTRATOR OF THE FEDERAL HIGHWAY ADMINISTRATION; T. L. WATERS, MANAGER OF PLANNING AND RESEARCH BRANCH OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; and WILLIAM R. ROBERSON, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION;
Respondents

* *

BRIEF IN OPPOSITION

* *

STATEMENT OF THE CASE

Both the District Court and the Court of Appeals - the former by summary judgment, the latter by a per curiam opinion - have held

that the claims of the Petitioner are barred by the doctrine of res judicata. He asserted those claims, including that which he now attempts to assert under the Highway Beautification Act, 23 U.S.C. 131, several years ago in the courts of North Carolina, and by final judgment of the North Carolina Court of Appeals, those claims were denied.

I. THE FACTS

The Petitioner owned some thirty "off-premises" billboards in the Town of Nags Head, North Carolina. The Town enacted an ordinance prohibiting such billboards, and gave the Petitioner five years and eight months to remove them. He did not do so, and after the removal period expired, filed suit in the courts of North Carolina, asserting various theories for relief including claims under the Highway Beautification Act, 28 U.S.C. 131, and 42 U.S.C. 1983. All of these claims were rejected by the courts of North Carolina, in a final judgment of the North Carolina Court of Appeals. The Petitioner never sought review from this Court. Months later, he filed the instant action in the United States District Court, which disposed of it by summary judgment.

II. THE FOURTH CIRCUIT'S DECISION

An appeal to the Fourth Circuit resulted in affirmance per curiam, stating, (Petition, p 27):

> "Res judicata bars Givens' claims. Givens had an opportunity to argue and fully argued each claim asserted herein before the North Carolina

Court of Appeals, which found constitutional and enforceable the Town's ordinance. Givens cannot relitigate such claims in this court."

SUMMARY OF ARGUMENT

This is a classic case for the application of the doctrine of res judicata and the doctrine was properly applied.

REASONS FOR DENYING CERTIORARI

The Petitioner, many years ago, elected to litigate his claims in state court. It lost, and made no effort to bring the case here. The thirteenth-hour attempt to replay the game from the beginning was properly discountenanced by the federal courts, and their disposition of the matter by summary judgment and per curiam affirmance is ample evidence that the matter was cut and dried. The Petitioner has had its day in the court of its choice; it was not entitled to a second day in the courts of another sovereignty.

CONCLUSION

Because the Petitioner has already unsuccessfully litigated its claims, the Petition for Certiorari should be denied.

Respectfully submitted,

THOMAS L. WHITE, JR.
KELLOGG, WHITE, EVANS, SHARP & MICHAEL
P. O. Box 189
Manteo, NC 27954
(919) 473-2171

JOHN V. HUNTER III
HUNTER, WHARTON & HOWELL
P. O. Box 10037
Raleigh, NC 27605
(919) 828-5466

Counsel for Respondents

Dated: July 15, 1985

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1963

In the Supreme Court of the United States

OCTOBER TERM, 1985

R.O. GIVENS SIGNS, INC., PETITIONER

v.

TOWN OF NAGS HEAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

Page

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 6

Heckler v. *Chaney*, No. 83-1878 (Mar. 20, 1985) 6-7

Linda R.S. v. *Richard D.*, 410 U.S. 614 7

Maine v. *Thiboutot*, 448 U.S. 1 ..... 4, 5

National Advertising Co. v. *City of Ashland*, 678 F.2d 106 ..... 2, 5-6

South Dakota v. *Adams*, 506 F. Supp. 50, aff'd *sub nom. South Dakota* v. *Goldschmidt*, 635 F.2d 698, cert. denied, 451 U.S. 984 2

State v. *Joyner*, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002 4

United States v. *Lovasco*, 431 U.S. 783 6

Vermont v. *Brinegar*, 379 F. Supp. 606 2

Statutes and regulation:

Highway Beautification Act, 23 U.S.C. 131 *et seq.*:

23 U.S.C. 131 ..... 1, 4

23 U.S.C. 131(a) 2

23 U.S.C. 131(b) 2, 6, 7

23 U.S.C. 131(c) 2

Page

Statutes and regulation—Continued:

23 U.S.C. 131(d) 2
23 U.S.C. 131(g) 2, 4, 5
5 U.S.C. 701(a)(2) 6
28 U.S.C. 1361 ..... 1, 6, 7
42 U.S.C. 1983 ..... 1, 3, 4, 5
1982 N.C. Sess. Laws ch. 1147, § 1 (codified at N.C. Gen. Stat. § 136-131.1 (Supp. 1983) 3
Nags Head, N.C., Ordinance § 6.04E(6) (May 1, 1972) 2
23 C.F.R. Pt. 750 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1963

R.O. GIVENS SIGNS, INC., PETITIONER

v.

TOWN OF NAGS HEAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner claims that it is entitled to just compensation under the Highway Beautification Act, 23 U.S.C. 131, for the removal, as required by a local ordinance, of its outdoor advertising signs along a federally-subsidized interstate or primary highway and that it is entitled to enforce that right in one of two ways: (1) an action against state and local officials under 42 U.S.C. 1983 for their failure to provide him with just compensation, or (2) a mandamus action under 28 U.S.C. 1361 to compel the Secretary of Transportation to deduct 10% of North Carolina's federal highway funds as the penalty for the state's noncompliance with the just compensation requirements of the Act.

1. a. The Highway Beautification Act, 23 U.S.C. 131, directs the Secretary of Transportation to establish a system of controls governing outdoor advertising adjacent to interstate and federally-subsidized primary highways. Designed

"to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty" (23 U.S.C. 131(a)), the controls are described in general terms in 23 U.S.C. 131(c) and (d), and implemented in detail by the regulations of the Federal Highway Administration, 23 C.F.R. Pt. 750. Under the highway beautification program, states are required to maintain "effective control" of outdoor advertising or suffer the loss of 10% of the federal highway funds they would otherwise receive. 23 U.S.C. 131(b) and (c); see *National Advertising Co.* v. *City of Ashland*, 678 F.2d 106, 108 (9th Cir. 1982); see generally *South Dakota* v. *Adams*, 506 F. Supp. 50 (D.S.D.), aff'd *sub nom. South Dakota* v. *Goldschmidt*, 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984 (1981). The "[j]ust compensation" requirement established by 23 U.S.C. 131(g) — *i.e.*, the source of petitioner's putative federal right here at issue — is one element of the participating states' obligation to maintain "effective control." See *National Advertising Co.* v. *City of Ashland*, 678 F.2d at 108; *Vermont* v. *Brinegar*, 379 F. Supp. 606, 610-613 (D. Vt. 1974). Although the Act provides the states with a "powerful incentive" to adopt conforming highway beautification programs, the "scheme of the statute is to grant the state[s] an election, not to mandate payment" of just compensation under 23 U.S.C. 131(g). 678 F.2d at 108. Accordingly, the Act creates neither "federal rights in favor of billboard owners" nor a "private cause of action for their benefit." *Id.* at 109.

b. In May 1972, the town of Nags Head, North Carolina, enacted a zoning ordinance prohibiting the construction of off-premises commercial signs and requiring that all such existing signs be removed by the end of a five-year period (Nags Head, N.C., Ordinance §6.04E(6) (May 1, 1972); Pet. App. 24, 29, 38-39). Tourism is a "vital part" of the economy of Nags Head, and the town enacted the ordinance to

enhance the "scenic beauty" of the area (*id.* at 39). The ordinance did not provide the owners of these signs with compensation for their removal. Instead, the ordinance contemplated that the owners would amortize their costs over the ensuing five-year period before the signs were to be removed (*ibid.*).

Petitioner is a corporation engaged in the business of commercial advertising and owns 30 off-premises commercial signs within the boundaries of Nags Head (Pet. App. 25, 39). After the conclusion of the five-year amortization period, in January 1978, petitioner brought suit in state superior court seeking, in the alternative, a declaratory judgment that the ordinance was invalid or compensation for the removal of its signs (*id.* at 38). The state superior court held that the Nags Head Ordinance was invalid, inter alia, on the ground that it failed to provide compensation for the removal of the signs, as required by a state statute that was adopted to implement the Highway Beautification Act, 1982 N.C. Sess. Laws ch. 1147, § 1 (codified at N.C. Gen. Stat. § 136-131.1 (Supp. 1983)) (see Pet. App. 24-25 40).

The North Carolina Court of Appeals reversed (Pet. App. 38-48; 58 N.C. App. 697, 294 S.E.2d 388 (1982)). The court held that the ordinance was not preempted by the state statute because the state statute applied only to those signs that were "lawfully erected," and petitioner's signs had been rendered unlawful by the Nags Head Ordinance (Pet. App. 43). The court stated that this result may be inconsistent with the 1978 amendments to the Highway Beautification Act, but held that the state statute had not incorporated those amendments at the time of the trial (Pet. App. 43-44). In addition, the court held that petitioner could not bring suit under 42 U.S.C. 1983 for an alleged violation of the Highway Beautification Act, on the ground that that

Act did not create "individual rights" and simply "authorizes federal-state agreements pursuant to which state regulatory statutes may be adopted" (Pet. App. 48).[1] The North Carolina Supreme Court declined to review the judgment of the state court of appeals (see *id.* at 25, 32; 307 N.C. 127, 297 S.E.2d 400 (1982)).

c. Petitioner thereafter brought suit in the United States District Court for the Eastern District of North Carolina against several state, local, and federal officials (Pet. App. 29-30). The district court ruled that petitioner's first five claims for relief were barred by the judgment entered in the earlier state court suit (*id.* at 32-33). The court also rejected petitioner's sixth and seventh claims, which alleged that the federal defendants had improperly approved the state's request to reclassify the highway along which petitioner's signs were located (*id.* at 33-34).[2] The district court held that "the reclassification decision did not serve to deprive [petitioner] of any benefits to which it was entitled" because the state court of appeals had held that petitioner had no right to compensation for the removal of its signs (Pet. App. 33-34).

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[1]In the state superior court, petitioner had moved to amend his complaint to raise a claim under 42 U.S.C. 1983 after this Court had decided *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) (see Pet. App. 47). The state superior court denied petitioner's motion (*ibid.*), and the state court of appeals upheld the superior court's ruling on the ground, as stated in the text, that petitioner had failed to state a claim under the Highway Beautification Act (*id.* at 47-48).

In addition, the court of appeals reversed the superior court's ruling that the Nags Head Ordinance was "confiscatory." Pet. App. 46 (citing *State* v. *Joyner*, 286 N.C. 366, 211 S.E.2d 320 (upholding three-year amortization period for nonconforming uses), appeal dismissed for want of a substantial federal question, 422 U.S. 1002 (1975)). The court of appeals also resolved several other issues that are not pertinent to the questions presented in the petition (see Pet. App. 44-47).

[2]Reclassification from primary to secondary status under the federal highways program has the incidental effect of eliminating the "[j]ust compensation" requirement of 23 U.S.C. 131(g) as to the affected highway. See 23 U.S.C. 131 (applicable only to interstate and primary highways).

The court of appeals affirmed the judgment of the district court in an unpublished opinion (Pet. App. 22-28). The court held that petitioner's earlier state court suit barred petitioner from relitigating the claims that it sought to raise in this suit in federal court (*id.* at 27).

2. a. Petitioner contends (Pet. 10-11) that 23 U.S.C. 131(g) guarantees it a federal statutory right to "[j]ust compensation" for the removal of its signs and that the courts below erred in refusing to allow it to enforce that right in an action against the respondent state and local officials under 42 U.S.C. 1983 for their failure to compensate petitioner. However, both courts below held that petitioner's present action in federal court was barred by virtue of the judgment entered against it in its earlier suit in state court. Petitioner does not directly challenge those rulings. Rather, it claims (Pet. 12) that the judgment entered in its earlier state court suit should not be given preclusive effect because state courts lack jurisdiction to adjudicate claims arising under the Highway Beautification Act. That argument is misdirected. Section 1983 generally provides a cause of action for the violation of federal statutory rights (*Maine* v. *Thiboutot*, 448 U.S. 1 (1980)), and the state courts have concurrent jurisdiction with the federal courts over claims brought under that statute (*id.* at 3 n.1). Indeed, the state court of appeals in petitioner's earlier suit ruled against petitioner on the merits of its Section 1983 claim (see Pet. App. 47-48; page 4 & note 1, *supra*).

In addition, the state court of appeals held (Pet. App. 47-48) that 42 U.S.C. 1983 does not provide petitioner with a cause of action to obtain compensation from the respondent state and local officials for the removal of its signs because the Highway Beautification Act creates no "individual rights" in sign owners. That ruling is consistent with the only decision by a federal court of appeals on this issue. See *National Advertising Co.* v. *City of Ashland*, 678 F.2d

at 108-109. Accordingly, review by this Court of petitioner's claim is not warranted.

b. In the alternative, petitioner claims (Pet. 11, 15-19) that it is entitled to bring a mandamus action in the district court under 28 U.S.C. 1361 to compel the federal respondents to deduct 10% of North Carolina's federal highway funds as a sanction for the state's noncompliance with the Highway Beautification Act. However, petitioner did not assert this claim in the court of appeals and therefore may not raise it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[3] Moreover, there is no conflict among the circuits on this question.

In any event, petitioner's claim lacks merit. An agency's decision whether to initiate enforcement proceedings, like those contemplated by 23 U.S.C. 131(b), is "committed to agency discretion by law" (5 U.S.C. 701(a)(2)) and therefore is not subject to judicial review in the absence of statutory guidelines for the agency to follow in exercising its enforcement powers. See *Heckler* v. *Chaney*, No. 83-1878

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[3]Petitioner cited 28 U.S.C. 1361 in its complaint (C.A. App. 21) and sought an order directing the Secretary of Transportation to deduct 10% of North Carolina's federal highway funds as well as an order declaring invalid the Secretary's decision to reclassify the pertinent highway from primary to secondary status (*id.* at 32). The district court only understood petitioner to claim that the federal respondents had abused their discretion by reclassifying the highway along which petitioner's signs were located from primary to secondary status; the court rejected petitioner's claim on the ground that the reclassification decision did not affect petitioner's rights, because it was not entitled to compensation for the removal of its signs (Pet. App. 33-34). On appeal, petitioner simply argued that it was entitled to judicial review of the allegedly improper reclassification and that the reclassification decision was invalid; petitioner did not argue that it was also entitled to bring suit under 28 U.S.C. 1361 to compel the federal respondents to enforce the deduction penalty of 23 U.S.C. 131(b) (see Appellant's C.A. Br. 2, 22-44, 49).

(Mar. 20, 1985), slip op. 11. Although the Highway Beautification Act empowers the Secretary of Transportation to deduct a percentage of a state's federal highway funds to enforce compliance with the requirements of the Act, the Act does not establish guidelines of any type to circumscribe or channel the Secretary's exercise of her enforcement authority. Indeed, to the extent that the Act speaks to this question at all, it confirms the Secretary's discretion by expressly providing that the Secretary may suspend the penalty provisions of the Act for whatever period she deems necessary whenever she finds that the public interest would be served by her action. 23 U.S.C. 131(b). Accordingly, because the Secretary is not obligated to initiate enforcement actions at the behest of private parties, 28 U.S.C. 1361, which vests jurisdiction in the district courts only where "a duty [is] owed to the plaintiff," does not entitle petitioner to the relief that it seeks.[4]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985

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[4]Moreover, it is dubious whether petitioner has standing to raise this claim, given the fact that the Secretary's decision to initiate enforcement proceedings would not rectify the harm that petitioner has alleged, *i.e.*, the failure to receive compensation for the removal of its signs. See, *e.g.*, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617-619 (1973).